No. 02-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARIA CANO, *et al.*,

Appellants,

v.

GRAY DAVIS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Central District of California

SENATE APPELLEES' MOTION TO AFFIRM OR DISMISS

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QUESTIONS PRESENTED

Where undisputed facts demonstrate that a challenged electoral district affords Latino voters an equal opportunity to participate in the political process and elect candidates of their choice, is a federal court nonetheless precluded from granting summary judgment against Section 2 and Equal Protection claims in which plaintiffs allege that the State intended to lessen Latino voting strength in the district that affords equal electoral opportunity?

Where the undisputed facts demonstrate that district lines adhere to traditional districting criteria, are multi-racial in character, and send no message either that they are based on race or that elected officials should disregard constituents of any race, is a district court nonetheless precluded from granting summary judgment to a State against claims that the districts violate the doctrine established by *Shaw v. Reno*, 509 U.S. 630 (1993), because they intentionally exclude some Latino voters?

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STATEMENT OF THE CASE

In a detailed and well-reasoned opinion, the District Court granted summary judgment upholding California's 2001 redistricting statute ("AB 632") against novel constitutional and Voting Rights Act challenges. These challenges were brought by Appellants, certain Latino voters and Latino civil rights organizations, who sought to require the State to maximize the number of districts in which Latinos would constitute at least 40% of the Democratic primary electorate.

AB 632 was passed with the overwhelming support of the State's substantial Latino Caucus. Uncontroverted facts demonstrated that in the particular districts that are the subject of this appeal, Congressional Districts 28 and 51 ("CD 28" and "CD 51"), Latino voters have at least an equal opportunity to participate in the political process and to elect candidates of their choice. Appellants themselves admitted as much with respect to CD 51. In the case of CD 28, undisputed evidence demonstrated that in the area comprising the district, Latino candidates routinely win elections against non-Latino candidates. Appellants produced no evidence that the Legislature subordinated traditional redistricting criteria to race in drawing the lines for either district or that either district is unexplainable on grounds other than race. As a result, the District Court concluded "that the legislature permissibly exercised its broad discretion to draw district lines, and that, in doing so, it violated neither the Voting Rights Act nor the Constitution." J.S. App. 2.[1]

Appellants' arguments for reversal are based on a misreading of the District Court's opinion and on legal principles foreign to this Court's jurisprudence. The decision below constitutes a routine application of settled legal principles and no more warrants plenary consideration by this Court than it

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[1] Citations to "J.S. App." are to the Appendix to Appellants' Jurisdictional Statement.

did the burden and expense of a trial below. No substantial federal question is presented, and there is no split in authority among the circuits or among three-judge district courts on any question that Appellants ask the Court to address.

Summary disposition by this Court will affirm that summary adjudication of insubstantial redistricting cases is appropriate and indeed necessary to avoid improperly burdening states that do not accede to demands that they redistrict pursuant to rigid racial "maximization" criteria. The judgment below should be affirmed or the appeal dismissed for want of a substantial federal question.

FACTUAL AND PROCEDURAL BACKGROUND

A. Latino Political Success In California Prior To AB 632

California's Latino candidates enjoyed remarkable success during the 1990s. At the time the Legislature enacted AB 632, Latino representatives comprised 22% of the California Legislature, including seven of the State's forty Senators (17.5%), and nineteen of the State's eighty Assembly Members (23.75%). J.S. App. 4, 57. As the District Court noted, "both the Assembly and Senate redistricting committees included Latino members," and "[a]t the time the redistricting bill was enacted," Latinos held several key "leadership positions" in the California Legislature including Senate Majority Leader, Senate Majority Whip, Senate Judiciary Committee Chair, Assembly Floor Leader, and Assembly Budget Committee Chair. *Id.* at 73.

Twice during the 1990s, Latinos were elected Speaker of the California Assembly.[2] Cruz Bustamante was elected Speaker in 1996, and later went on to become California's

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[2] District Court ("D. Ct.") Docket No. 185 (Declaration of Keith E. Weaver In Support Of Senate Defendants' Motion For Summary Judgment Re: San Fernando Valley Congressional Districts), at ¶¶ 5, 7.

Lieutenant Governor, a position to which he was re-elected in 2002.[3] In 1998, Antonio Villaraigosa was elected Speaker by Assembly Democrats, while Assembly Republicans elected Assemblymember Rod Pacheco as their leader. *See supra* note 2, at ¶¶ 5, 7.

Latinos are also prominent in the "internal hierarchy of the majority political party in California." J.S. App. 73. The California Democratic Party leadership includes three Latinos, all of whom are elected by Party representatives, including "long-time California Democratic Party Chairman Art Torres." *Id.* at 73-74.

At the time AB 632 was enacted, six of California's then fifty-two congressional districts were represented by Latinos. *See supra* note 2, at ¶¶ 18-20. Of the fifteen congressional districts in Los Angeles County, four were served by Latino representatives. *Id.* at ¶ 14; *Wilson v. Eu*, 823 P.2d 545, 594-95 (Cal. 1992).

B. The 2001 Redistricting Process And AB 632

1. *AB 632 Provides Equal Opportunity To Latino Voters*

California gained an additional congressional seat in the 2001 reapportionment, increasing the delegation to fifty-three members. J.S. App. 2. Appellants admit that AB 632 includes nine congressional districts that provide Latino voters with a fair opportunity to elect candidates of their choice. M.A. App. 13a (¶54).[4] Included among Appellants' nine "fair" districts is CD 51, one of the districts that Appellants nonetheless challenged below and continue to challenge

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[3] The 2002 California Lieutenant Governor Election Results are available at http://vote2002.ss.ca.gov/Returns/ltg/oo.htm (last modified Nov. 21, 2002). *See also supra* note 2, at ¶¶ 5, 7.

[4] Citations to "M.A. App." refer to the Appendix attached to this Motion to Affirm or Dismiss.

in this appeal. J.S. App. 81. These nine districts—even were they the only districts that Latino voters are likely to dominate—make up 17% of the congressional districts in California. By comparison, only 16% of California's registered voters and 17.5% of California's citizen voting-age population are Latino.[5] *Supra* note 2, at ¶¶ 3-4.

AB 632 also reflected growing Latino voting strength in ethnically diverse Los Angeles County. CD 39 is "a majority-Latino district located in the southeastern portion of Los Angeles County." J.S. App. 72. The evidence before the District Court demonstrated that CD 39 had no incumbent and that this "new" district was likely to elect an additional Latino representative in November 2002.[6] As the District

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[5] In addition to the nine districts that Appellants embrace—Congressional Districts 20, 31, 32, 34, 38, 39, 43, 47 and 51—there are four additional districts in which Latinos have significant voting strength. *See supra* note 2, at ¶ 20. One such district is CD 28, which is 56% Latino in population and 27% Latino in registration. *Id.* at ¶ 23; J.S. App. 37. Similarly, CD 18 is 42% Latino in population, and the Latino registration is 26%. *Supra* note 2, at ¶ 16. With Latinos comprising over a quarter of the registered voters in both districts, representatives of these districts will clearly need to be responsive to the Latino community. *Cf. Rural W. Tenn. African Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1105 (W.D. Tenn.) (three-judge court) ("A serious candidate for office cannot ignore 25% of the population that tends to vote as a bloc."), *summarily aff'd*, 516 U.S. 801 (1995). In two other congressional districts, CDs 16 and 21, Latinos comprise over 22% of the registered voters. *Supra* note 2, at ¶ 16. These four districts are, at a minimum, Latino "influence" districts. In the 2002 elections, CD 21 elected Republican Devin Nunes and CD 18 elected Democrat Dennis A. Cardoza. *See generally* http://vote2002.ss.ca.gov/Returns/usrep.htm (last modified Nov. 21, 2002). Adding the nine districts identified by Appellants to the four influence districts, there are at least thirteen congressional districts out of fifty-three (24.5%) in which Latino voters have a powerful electoral voice.

[6] The district ultimately elected Representative Linda Sanchez. *See* http://vote2002.ss.ca.gov/Returns/usrep/3900.htm (last modified Nov. 21, 2002).

Court summarized: "As a result of redistricting, 5 of 15 (33 1/3%) congressional seats with some territory in Los Angeles County will almost certainly be held by Latinos, although Latinos constitute only 24% of the county's registered voters." *Id.*

2. *AB 632 Adheres To Traditional Districting Criteria*

In drawing California's congressional districts, the Legislature was guided by various statutory and constitutional criteria. For example, both the State and Federal Constitutions require that the population of all California congressional districts be nearly equal. *See* Cal. Const. Art. XXI, § 1; *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). California also requires that districts be contiguous and respect political boundaries such as city limits. *See* Cal. Const. Art. XXI, § 1.

AB 632 adheres to these traditional districting criteria. It achieves exact population equality and carefully preserves the integrity of city boundaries. J.S. App. 21 n.14, 23, 31. The District Court also found that both CDs 51 and 28 are compact and contiguous. *Id.* at 31.

3. *The Process By Which AB 632 Was Adopted Was Open And Inclusive*

Following the release of 2000 census figures, the California Legislature held a series of hearings at which community members testified regarding potential changes to district boundaries. *Id.* at 2-3. Latino advocacy groups including Appellants' counsel, the Mexican American Legal Defense and Educational Fund ("MALDEF"),[7] testified extensively at these hearings. *Id.* at 3.

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[7] Regarding MALDEF's role in the redistricting process, the District Court stated: "MALDEF was a leading participant in the redistricting period . . . and [Plaintiffs' expert] Dr. Kousser worked with it, applying

The Legislature subsequently released proposed district lines and "heard public comment on the draft plan." *Id.* at 4. Advocacy groups, including MALDEF, again commented on the proposed districts, and the initial plans for CDs 28 and 51 were significantly revised. *Id.* at 73. These changes were included in a second districting plan, which was introduced in the Legislature as AB 632. *Id.* at 4.

MALDEF and another group, the William C. Velasquez Institute ("WCVI"), drafted their own districting plan, which they submitted to the Legislature along with an article by Professor J. Morgan Kousser, Appellants' expert in this case. J.S. App. 168. Dr. Kousser's article, entitled "The Role of Cross-Over Districts in a Fair Redistricting: Lessons from the 1990s" ("Cross-Over Voting"), proposes a novel redistricting requirement that is explicitly grounded on race and presumed identification between race and political party. According to Dr. Kousser, in order to maximize the number of Latinos elected to public office, the Legislature should create districts in which Latinos constitute at least 40% of the district's Democratic registration.[8] Dr. Kousser's 40% rule forms the basis for Appellants' argument that AB 632 improperly dilutes Latino voting strength.[9]

AB 632 was enacted by the most diverse Legislature in California's history, and received overwhelming bipartisan support, including the unanimous support of the minority

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the theories he now offers as an expert witness in this case. Accordingly, some of MALDEF's submissions to the legislature may be relevant evidence, not because they constitute plaintiffs' position in this litigation, but because they reflect the opinion of MALDEF's expert on the issues presented by this case." J.S. App. 59 n.36.

[8] *See, e.g.*, D. Ct. Docket No. 207 (Appellants' Opposition To Senate Defendants' Motion For Partial Summary Judgment Re: San Fernando Valley Congressional Districts), at 19-20.

[9] Dr. Kousser's article is attached to D. Ct. Docket No. 7 (Declaration Of Expert Witness J. Morgan Kousser), at Exhibit C.

Republican Party. It passed by a thirty-eight to two margin in the Senate and by a seventy to ten margin in the Assembly. J.S. App. 4. Although alleged by Appellants to constitute an intentional and invidious discrimination against Latinos, the bill won the support of twenty-three out of twenty-six Latino members of the Legislature, including every Latino State Senator in California. *Id.*

C. The Challenged Districts

On appeal, Appellants challenge only two of California's fifty-three congressional districts: CD 28, which is located in Los Angeles County's San Fernando Valley, and CD 51, which extends along the United States-Mexico border, and includes portions of San Diego and all of Imperial County, which lies to the east of San Diego County.[10]

Both CDs 28 and 51 are majority-minority districts. The population of CD 28 is approximately 55.7% Latino, 6.8% Asian-American, and 5% African-American. *See supra* note 2, at ¶ 23; J.S. App. 37. CD 51 is even more diverse. Its population is approximately 53.3% Latino, 14.5% Asian-American, and 10.8% African-American .[11]

Representative Howard Berman resides in CD 28, and Representative Bob Filner resides in CD 51. Both districts differ from the districts previously represented by these incumbents, Districts 26 and 50, respectively. The 1991 redistricting plan was crafted by a team of Special Masters, appointed by the California Supreme Court following a

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[10] Appellants unsuccessfully alleged that the district lines of a single State Senate district, Senate District 27 ("SD 27"), diluted Latino voting strength in violation of Section 2 of the Voting Rights Act, J.S. App. 49-63, but Appellants do not appeal from that part of the District Court's ruling, J.S. 5 n.3.

[11] D. Ct. Docket No. 180 (Declaration of Keith E. Weaver In Support Of Senate Defendants' Motion For Partial Summary Judgment Re: San Diego Congressional Districts), at ¶ 3.

legislative stalemate.[12] *Wilson*, 823 P.2d at 548; *see also* J.S. App. 12 n.7. In drawing CD 26, the Masters "abandoned the historical district configurations in the Valley, and substantially altered the district that Rep. Berman had long represented." J.S. App. 35. In doing so, the Masters removed Congressman Berman from many southern areas of the San Fernando Valley that he had represented "for decades as a member of the California Assembly and in Congress." *Id.*

AB 632 restored much of the territory previously represented by Congressman Berman. *Id.* Indeed, over 98% of the population added to CD 28 resides in areas that he previously represented either in Congress or in the Assembly or both. M.A. App. 33a (map). The Latino "core" in the Valley, and the core of Congressman Berman's district from the 1990's, remained intact. J.S. App. 18, 35; *see also* M.A. App. 31a-32a (maps).

With respect to CD 51, the most significant change was the inclusion in the district of Imperial County. Although the Legislature's initial proposal placed Imperial County in neighboring Congressional District 53 ("CD 53"), the proposal was modified after MALDEF argued that voters in Imperial County share a community of interests with voters in San Diego due to their mutual proximity to the Mexican border. J.S. App. 23. MALDEF and WCVI later sent a letter

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[12] Dr. Kousser has written disapprovingly of the Masters and the plan they created. According to Dr. Kousser, all three Masters were "Anglo" because a Spanish-surnamed Master, Rafael Galceran, "was completely unknown to the Latino legal community in Los Angeles . . . ." J. Morgan Kousser, Colorblind Injustice, 171 n.102 (The University of North Carolina Press 1999). When the then leader of MALDEF's reapportionment efforts testified before the Masters, he observed: "All I remember is looking up at three old white men." *Id.*

to the Legislature endorsing the inclusion of Imperial County in what became the final district lines for CD 51.[13]

D. Procedural Background

Appellants' First Amended Complaint alleged that CD 28 and CD 51 violate both Section 2 of the Voting Rights Act ("Section 2"), 42 U.S.C. § 1973, and the Fourteenth Amendment to the United States Constitution. M.A. App. 1a-19a. Appellants advanced three distinct legal theories: (1) that CD 28 violates Section 2 because it has a discriminatory effect on the ability of Latino voters to participate equally in the political process and elect candidates of choice;[14] (2) that CD 28 and CD 51 were drawn with the intent to dilute Latino voting strength in violation of both Section 2 and the Fourteenth Amendment; and (3) that CD 28 and CD 51 allegedly constitute an unconstitutional racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny. M.A. App. 1a-19a; *see also* J.S. App. 5-6. In sum, Appellants alleged that nine of California's fifty-three congressional districts (17%) do provide Latino voters a fair opportunity to elect candidates of their choice, but that one

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[13] D. Ct. Docket No. 147 (Declaration Of Bruce A. Wessel In Support Of Senate Defendants' Motion For Protective Order), at Exhibit D. Appellants concede that CD 51 provides Latino voters with an equal opportunity to elect candidates of choice, J.S. App. 81, and Appellants' expert, Dr. Kousser, concluded that "there was no discriminatory effect in the drawing of congressional district 51. . . .," *id.* at 135.

[14] The District Court granted summary judgment to Defendants on this claim as well, and Appellants have waived any challenge to that part of the District Court's ruling by failing to address this aspect of the ruling in either their Questions Presented or their Jurisdictional Statement. *See* Supreme Court Rule 14.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court."); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) (citing Supreme Court Rule 14.1(a)); *see also* Supreme Court Rule 18.3 (stating that appellant filing jurisdictional statement should "follow, in so far as applicable, the form for a petition for a writ of certiorari").

more such congressional district "could have been drawn." M. A. App. 13a (¶ 54). As the District Court explained, Appellants' proposed remedy for both their dilution claims and their *Shaw* claims is a plan "that contains the maximum number of majority-Latino districts possible." J.S. App. 20.

On October 15, 2001, Appellants unsuccessfully moved for a temporary restraining order ("TRO") to postpone primary elections in the challenged districts. *See Cano v. Davis*, 191 F. Supp. 2d 1135 (C.D. Cal. 2001). Later, several minority groups, including "Los Angeles-area Latino community organizations," applied to intervene on the side of Defendants. J.S. App. 4 n.4. Their applications were denied, although they were permitted to participate as *amici curiae*. *Id.*

Defendant Senator John Burton, in his official capacity as President Pro Tempore of the California State Senate, and Intervenor-Defendant California State Senate (collectively, the "Senate") thereafter moved for summary judgment on all claims, and the other Defendants joined in the motions. J.S. App. 7. The Senate argued that the undisputed facts demonstrate that the challenged districts are fair and that the *Shaw* doctrine is not implicated by either CD 28 or CD 51. The Senate submitted extensive and uncontradicted evidence of election results that demonstrated the electoral success of Latino-preferred candidates. *See, e.g.*, M.A. App. 20a-30a (Declaration of Professor Allan J. Lichtman).[15] The Senate also submitted uncontroverted evidence demonstrating that the challenged districts adhere to traditional districting criteria and are readily explainable on grounds other than race.

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[15] Professor Lichtman is, as Appellants have acknowledged, "a widely-recognized expert on bloc voting and quantitative analysis." *Supra* note 8, at 23. Professor Lichtman has published numerous scholarly works on voting rights. *See, e.g.*, Allan J. Lichtman & J. Gerald Herbert, "A General Theory Of Vote Dilution," 6 La Raza L.J. 1 (1993).

Appellants failed to submit any evidence that Latino-preferred candidates are regularly defeated in any of the challenged districts. Instead, Appellants relied primarily on the same evidence that they relied on at the TRO phase, including Dr. Kousser's Cross-Over Voting article and its novel racial and partisan redistricting criterion. As explained above, that article argued that the Legislature, in order to maximize the number of Latinos elected to office, should create districts in which Latinos comprise at least 40% of the registered Democratic voters. This theory, advanced by Appellants below as the appropriate legal standard for courts to adopt in enforcing the Voting Rights Act and the Constitution, is unprecedented in at least two ways. First, although Section 2 safeguards the ability of protected classes of voters to "participate in the political process and elect *representatives of their choice*," 42 U.S.C. § 1973(b) (2002) (emphasis added), Dr. Kousser's theory is aimed explicitly at maximizing the election of candidates who are themselves Latino as opposed to candidates favored by Latinos. Second, by focusing only on the Latino percentage of Democratic registration, Dr. Kousser's theory ignores the growing number of Latino voters who are registered with the Republican Party or other political parties. J.S. App. 48 n. 28.[16]

Appellants' largely ignored the Senate's "effects" evidence, relying instead on "intent" allegations. The Senate

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[16] As the *Sacramento Bee* reported, "Kousser's study, strangely, ignored the success of the four Hispanic Republicans who were elected in districts that were not 'Hispanic' by any stretch of the imagination." Daniel Weintraub, *Time To Look Beyond Ethnicity In District Lines*, Sacramento Bee, Sept. 9, 2001. "I don't know why Latino Republicans win in those areas," Dr. Kousser told the *Bee*. "It's a huge puzzle." *Id.* But as the District Court observed, voting in California does not follow the pattern of "rigid racial bloc voting on all sides" that Judge Posner found in 1998 Chicago. *See Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998).

filed over twenty pages of objections to this evidence, including objections to sworn statements by Appellants' fact witnesses, as well as portions of the declarations and report submitted by Dr. Kousser. The District Court found it unnecessary to rule on these objections because Appellants' evidence was, in any event, inadequate to warrant a trial. *Id.* at 3 n.2.[17]

The Senate's reply highlighted Appellants' failure to demonstrate that candidates favored by Latinos are routinely defeated by non-Latino bloc voting in the territories that comprise CDs 28 and 51, or to provide evidence necessary to support their *Shaw* claims. With respect to CD 51, Appellants *admitted* that Latinos have a fair opportunity to elect a candidate of their choice. With respect to CD 28,

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[17] The intent evidence included a declaration by Assemblymember Juan Vargas, who unsuccessfully challenged Representative Filner for Congress in 1992 and 1996. In deposition, Mr. Vargas noted that he "hate[s]" Representative Filner, but testified that the Legislature did *not* enact AB 632 with the intent of discriminating against Latinos. M.A. App. 42a-45a (deposition excerpts). Appellants first submitted a declaration by Mr. Vargas in connection with their application for a TRO. J.S. 10 n.6; J.S. App. 161-67. The declaration allegedly reports statements of other members of the Legislature or their staff in violation of established legislative privilege precedents. In ruling on privilege issues, the District Court expressly held that Mr. Vargas did not have the right to waive the legislative privilege held by other Legislators. J.S. App. 94. (Morrow and Snyder, D.J.J., Reinhardt, C.J., dissenting). Mr. Vargas submitted a narrower declaration in opposition to the Senate's summary judgment motions. *Id.* at 121-25. The TRO declaration was not submitted to the District Court in connection with the summary judgment motions that are the subject of this appeal, see Summary Judgment Oral Argument Transcript (May 13, 2002) at 163-64 (acknowledgement of Appellants' counsel), and Appellants do not appeal the District Court's privilege ruling. Accordingly, this Court should decline to consider Mr. Vargas's TRO declaration, which Appellants have nonetheless included in the Appendix to their Jurisdictional Statement. *See, e.g.*, J.S. 10 n.6; J.S. App. 161-67.

Professor Allan J. Lichtman concluded that "in most elections, Hispanic candidates of choice would have been elected within the precincts [that comprise] CD 28." M.A. App. 21a.

The District Court heard oral argument on the motions on May 13, 2002, and on June 24, 2002 granted summary judgment in favor of Defendants on all claims. This appeal followed.

THE RULING OF THE DISTRICT COURT

A. The District Court Held That The State Was Entitled To Summary Judgment On Appellants' Vote Dilution Claims Because The Undisputed Evidence Demonstrated That Latino Voters Have An Equal Opportunity To Participate In The Political Process And To Elect Candidates Of Their Choice In The Challenged Districts.

The District Court rejected all of Appellants' vote dilution theories. The District Court first addressed what it termed "the traditional statutory vote dilution" claim under Section 2 (the "effect" claim), and then addressed Appellants' "intentional vote dilution claims" under both Section 2 and the Constitution (the "intent" claims).

1. *The Effect Claim*

Because CD 51 was conceded to provide Latino voters an equal opportunity to elect candidates of their choice, the only congressional district challenged under the Section 2 "effect" standard was CD 28. In addressing this claim, the District Court explained the three pre-conditions set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986), J.S. App. 41-42, and this Court's observations in *Johnson v. De Grandy*, 512 U.S. 997 (1994), "that vote dilution under § 2 is not automatically established even if all three *Gingles* pre-conditions are established," J.S. App. 43. If the *Gingles*

pre-conditions are satisfied, "a court . . . must then assess the totality of the circumstances to determine if . . . minority voters' political power is truly diluted." J.S. App. 43. The District Court concluded that because of the absence of *Gingles*' "pre-condition three" there was no need to "reach the totality of the circumstances test." *Id.* at 44. The District Court explained that, under the third *Gingles* pre-condition, the plaintiff "must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* at 42. The obvious corollary is that "if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice" and there is no need for federal court intervention. *Id.*

The undisputed factual record before the District Court showed that Latino-preferred candidates regularly win elections "in the territory that constitutes CD 28." *Id.* at 64. "[A] substantial number of white voters in the San Fernando Valley [in which CD 28 is located] are willing to support Latino and Latino-preferred candidates and . . . white-bloc voting does not result in the regular defeat of Latino or Latino-preferred candidates." *Id.* at 66. The District Court cited uncontroverted election results from the 2001 City of Los Angeles mayoral and city attorney elections in which both the Latino mayoral candidate and the Latino city attorney candidate won the precincts comprising CD 28.[18]

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[18] Antonio Villaraigosa, a Latino running for mayor, "handily defeated" a white opponent "in the precincts that now constitute CD 28" by a margin of "54.7% to 45.3%." J.S. App. 67. With "the assistance of white cross-over votes, city attorney candidate [Rocky] Delgadillo won the precise area that now comprises CD 28" by a margin of "52% to 48%." *Id.* In a City Council election that "pitted a white candidate, Wendy Greuel, against a Latino, Tony Cardenas, . . . Cardenas won the precincts that are within CD 28 in both the primary and the general elections." *Id.* All three candidates were the overwhelming choice of Latino voters.

The District Court concluded that: "CD28 . . . is a district in which neither Latinos nor Latino-preferred candidates are regularly defeated by a non-Latino bloc vote. To the contrary, Latino candidates who run in the area covered by the district generally prevail. Accordingly, the 2001 redistricting plan does not have the effect of diluting the minority vote in CD 28." J.S. App. 70.

2. *The Intent Claims*

The District Court separately analyzed Appellants' intentional vote dilution claims regarding CDs 28 and 51. *Id.*

As the District Court explained, "[i]n order to prove intentional vote dilution, plaintiffs must both demonstrate the requisite type of discriminatory intent . . . and establish dilutive effects on the voting potential of racial or ethnic minorities." *Id.* at 71 (citations omitted). The District Court looked at the evidence of discriminatory intent and concluded that the alleged intent of the Legislature "appears not to be of the type that the Supreme Court held necessary for an intentional vote dilution claim in *Bolden*, *Rogers*, and *Bandemer*." *Id.* at 75-76.[19] Although the District Court "strongly doubt[ed] that the 2001 redistricting statute was a purposeful device to further racial discrimination, in whole or in part," it

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In addition to these three elections, the District Court discussed the success of Lt. Governor Cruz Bustamante and Insurance Commissioner candidates Art Torres and Diane Martinez in the territory of CD 28. *Id.* at 66 n. 41. The District Court found the success of these statewide Latino candidates in the area of CD 28 to be less relevant than more local elections in assessing voter attitudes, but agreed that their success "demonstrates that Latino candidates are not routinely defeated in the precincts that comprise CD 28." *Id.*

[19] *See City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Davis v. Bandemer*, 478 U.S. 109 (1986).

did not rest its decision on that rationale. *Id.* at 76. Instead, the District Court rested its decision on the absence of dilutive effects.

As the District Court explained, "plaintiffs in vote dilution cases must . . . show a practical effect on the minority group's ability to elect representatives of choice" even if dilutive intent is shown. *Id.* at 79. The District Court labeled this effect requirement an "irreducible minimum in intentional vote dilution cases . . ." *Id.*

The undisputed evidence before the District Court was that in CD 28 "Latinos constitute a plurality," that "non-Latino voters have shown that they are willing to vote for Latino candidates," and that "Latino candidates receive a majority of the overall vote with some regularity." *Id.* at 80. With respect to CD 51, the District Court stated: "We need not deliberate as to whether a genuine question of fact exists . . . [because] Plaintiffs admit that the legislature established a district that is a fair opportunity district for Latinos." *Id.* at 81. Based on this and other undisputed evidence, the District Court found that "the most basic and necessary dilutive effect is lacking." *Id.* at 80.

B. The District Court Held That The State Was Entitled To Summary Judgment On Appellants' *Shaw* Claims Because The Undisputed Evidence Demonstrated That The Challenged Districts Do Not Give Rise To The Type Of Harm That *Shaw* Is Designed To Remedy And The State Did Not Subordinate Traditional Districting Principles To Race.

The District Court also granted the Senate's motion for summary judgment on Appellants' claim that CDs 28 and 51 violate the Fourteenth Amendment under the "racial gerrymander" doctrine set forth in *Shaw I* and its progeny. The District Court carefully reviewed this Court's precedents,

noting the particular harms that the *Shaw* doctrine is designed to address and the high burden Appellants face in pressing a claim under *Shaw*. J.S. App. 8-11. The District Court then explained why Appellants' evidence, even assuming it to be both true and admissible, was inadequate to establish such a cause of action. *Id.* at 11-38.

The District Court stated that, "these are not race-based districts that 'balkanize us into competing racial factions' or deliberately segregate voters into separate racial enclaves. *Shaw I*, 509 U.S. at 657. They cannot under any fair reading, be characterized as 'white districts' or 'Caucasian districts.' Nor are they districts that can only be reasonably understood to 'belong' to one ethnic or racial group." J.S. App. 13. "To the contrary," the District Court stated, "the districts at issue here are diverse and multi-ethnic: each contains a variety of racial and ethnic groups; none unites any single group of individuals within its boundaries for the purpose of permitting that group to exercise hegemony." *Id.* at 13-14.

The District Court continued: "There is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district. Perhaps for this reason, one searches the record in vain for evidence of the type of harms that *Shaw* claims are designed to remedy—the 'representational' and 'expressive' harms described in *Shaw I*." *Id.* at 14-15. The District Court noted: "the message communicated by the redistricting plan is that in order to succeed in either of these districts a representative must build and maintain multi-racial coalitions." *Id.* at 15.

The District Court rejected Appellants' arguments that the shapes of the challenged districts and changes in boundary lines demonstrated impermissible consideration of race. *Id.* at 18. As the District Court observed, "the population shifts that are the subject of plaintiffs' *Shaw* claims represent a relatively minor portion of the districts at issue. Moreover, the removals of Latino voters were made at the margins or

perimeters . . . ." *Id.* Citing this Court's decision in *Easley v. Cromartie*, 532 U.S 234 (2001) ("*Cromartie II*"), the District Court held that "such discrete population shifts cannot constitute a *Shaw* violation." J.S. App. 19. "To adopt plaintiffs' sweeping construction of the racial gerrymandering doctrine," the District Court stated, "would render suspect virtually any legislative decision regarding the districts in which to place areas or groups of precincts that are predominantly populated by one racial or ethnic group. Such an approach would render meaningless the guarantee that the *Shaw* doctrine 'does not throw into doubt the vast majority of the Nation's 435 congressional districts . . . even though race may well have been considered in the redistricting process.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring)).

The District Court also rejected Appellants' *Shaw* theory because the relief requested—districts that would be more reliably Latino—was inconsistent with a *Shaw* remedy. "Plaintiffs contend that a group of Latino residents was excluded from each of CD 28 and CD 51 in order to ensure that the number of Latino residents in those districts did not rise above a certain percentage. To the extent that this is true, it implicates the Equal Protection Clause as a claim of constitutional vote dilution, not as an 'analytically distinct' claim of racial gerrymandering. What plaintiffs seek as a *Shaw* remedy is a redistricting plan that contains the maximum number of majority-Latino districts possible. This is not a requirement of constitutional districting." J.S. App. 19-20 (citing, *inter alia*, *Miller*, 515 U.S. at 915; *De Grandy*, 512 U.S. at 1017).

Finally, the District Court rejected Appellants' *Shaw* claims for the independent reason that "Plaintiffs had put forth no evidence that traditional districting principles were not followed and were subordinated to racial considerations." J.S. App. 20 (title caps omitted). In that regard, the District

Court found (1) that both CD 28 and CD 51 "are reasonably compact and contiguous"; (2) that neither is irregular in shape; (3) that undisputed evidence established that AB 632 "achieved the precise mathematical equality in congressional district populations" required by this Court's precedents; (4) that AB 632 decreased the number of city-splits in congressional districts statewide; and (5) that the record contained "specific, uncontroverted evidence that the traditional districting principles applied statewide were not abandoned, but rather were rigorously applied in the configuration of both CD 51 and CD 28." *Id.* at 22-38.

With respect to CD 51, the entirety of Imperial County, rather than particular enclaves, was added to the district. *Id.* at 23. The addition of this territory necessitated the removal of other parts of the district in order to achieve population equality. *Id.* These boundary changes showed respect for existing communities of interest, preserved the essential core of the previous district, and were accomplished without unnecessary city splits. *Id.* at 23-24. As a result of the changes, the "dominant political party's electoral base in a politically-marginal district that abuts CD 51" was strengthened, providing an explanation for the change in district lines that relates to politics, not race. *Id.* at 24-25. Given the predominant role that race played in Appellants' proposals, the District Court unsurprisingly found that AB 632 adheres to traditional districting criteria more strictly than the plans advanced by Appellants and their counsel. *Id.* at 30 n.19.

As to CD 28, the District Court found "abundant and uncontroverted evidence in the record" that traditional districting principles were followed and were not subordinated to race. *Id.* at 35. In particular, the court found that "one important reason for the new district lines was to respond to requests by residents of the southern San Fernando Valley (the Valley) to be included in the district of Rep. Berman," who had represented southern portions of the Valley "for

decades as a member of the California Assembly and in Congress," but who had been removed from those areas as a result of a plan adopted by Special Masters in California in 1991. *Id.* at 34-36. According to the District Court, "[t]he current redistricting plan thus modified the Special Masters' Plan by reestablishing, in part, Rep. Berman's traditional district . . . and conform[s] to traditional districting principles to at least the same degree as the district created by the Special Masters and the alternative district proposed by plaintiffs." *Id.* at 35-36. The court further found that Appellants' evidence of racial intent was "essentially equivalent to the statement the Supreme Court found insufficient to support a *Shaw* claim in *Cromartie II*." *Id.* at 34.

For all of these reasons, the District Court granted summary judgment for Defendants.

ARGUMENT:

THE JUDGMENT BELOW SHOULD BE SUMMARILY AFFIRMED OR THIS APPEAL DISMISSED

The decision of the three-judge District Court should be summarily affirmed, or the appeal dismissed for want of a substantial federal question. The undisputed facts demonstrate that there are no issues requiring plenary Supreme Court review. "Time and again [this Court has] emphasized that reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quiltner*, 507 U.S. 146, 156-57 (1993) (citations omitted). Moreover, as this Court stated in *Miller*, "courts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of a litigation and determining whether to permit discovery or

trial to proceed." *Miller*, 515 U.S. at 916-17. It is difficult to conceive of a case more clearly calling for summary adjudication, and for summary disposition by this Court.

A. The District Court Properly Entered Summary Judgment Against Appellants' Vote Dilution Claims

1. *Appellants' Theories Wholly Ignore This Court's Constitutional Vote Dilution Precedents*

Appellants argued that AB 632 violated the Constitution's prohibition against vote dilution. Seminal cases setting forth the constitutional standard include: *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, 458 U.S. 613 (1982); and *Davis v. Bandemer*, 478 U.S. 109 (1986). None of these cases is mentioned in the Jurisdictional Statement. Appellants have now abandoned any claim based on those precedents, apparently because they understand that they cannot meet the evidentiary burdens facing plaintiffs in such cases. *See, e.g., Whitcomb*, 403 U.S. at 160 (finding no vote dilution despite proof that districting plan resulted in protected class of voters having "no legislative seats assigned to them"); *Rogers*, 458 U.S. at 623-25 (discussing requirement of presenting evidence of "exclusion from the political process"); *Bandemer*, 478 U.S. at 139 (noting that claims of intentional vote dilution based on race have been upheld only where "the racial minorities . . . had essentially been shut out of the political process").

2. *Appellants' "Intent Alone" Theory Has Been Consistently Rejected By The Courts*

The theory that Appellants do pursue in this appeal is an "intent alone" theory. Appellants argue that a reduction in Latino voting strength in a district is, in and of itself, unlawful if the Legislature intended that result to benefit a non-Latino incumbent. Such an intent, Appellants contend,

violates the Voting Rights Act even if: (1) Latino candidates and Latino-preferred candidates regularly win elections in the precincts comprising the challenged district; and (2) there is an absence of racial bloc voting that defeats Latino-preferred candidates.

The contention at the core of Appellants' argument is: "[T]he [*Gingles*] Court never stated or even suggested that *intent alone* could not, as it had before the [1982 amendments to the Voting Rights Act], prove an independent violation of section 2." J.S. 14 (emphasis added). Appellants reiterate: "*[I]ntent all by itself* continues, after *Gingles* as before it, to amount to a violation of the Voting Rights Act." *Id.* at 15 (emphasis added). Appellants ignore the many cases that reject this very argument.

Appellate courts have consistently rejected "intent only" claims under Section 2 of the Voting Rights Act. The Eighth Circuit in *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995), stated: "We reject . . . plaintiff's argument that [a] § 2 'intent' claim does not require proof of discriminatory effect." *Id.* at 1356 n.18. Similarly, the Eleventh Circuit in *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996), reversed a district court's decision holding that "proof of discriminatory intent is sufficient to establish a § 2 violation." *Id.* at 1561. The *Johnson* court concluded that the district court's holding was "inconsistent with the Supreme Court's decision in *Voinovich*."[20] *Id.* Both the Eighth and Eleventh Circuits relied on the following passage from *Voinovich* in rejecting the notion of an "intent only" Section 2 claim: "§ 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a

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[20] *See also Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) ("[D]iscriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2").

protected class the equal opportunity to elect its candidate of choice does it violate § 2." *Voinovich*, 507 U.S. at 155 (emphasis in original).[21]

Appellants' "intent with no effects" Voting Rights Act claim is therefore inconsistent with settled law, while the ruling below is consistent with the rulings of this Court and with the conclusions of other federal courts. Plenary review is unnecessary.

3. *Appellants' "Lessened Effect" Theory Is Not Supported By Caselaw*

Appellants fall back on an argument that a plaintiff's burden of proving dilutive effect is "lessened" when intentional discrimination is alleged and that the *Gingles* standard "is a higher standard" that does not apply in such situations. J.S. 15-16. Attempting to find some "effect," Appellants argue that a district with fewer Latino voters has less Latino voting strength than a district with more Latino voters. *Id.* While impeccable as a matter of logic, this is, as a legal matter, a wholly insufficient basis on which to strike down a State's redistricting plan. All of the congressional districts in California after the 2001 redistricting differed from the districts that existed before. When an "old" district is compared to a "new" district, the percentage of Latino

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[21] *See also Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("[T]he statute proscribes intentional discrimination only if it has a discriminatory effect, but proscribes practices with discriminatory effect, whether or not intentional. This new 'results' criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination."); *Gingles*, 478 U.S. at 44 ("The intent test was repudiated [in the 1982 amendments] for three principal reasons—it is 'unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,' it places an 'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question.'").

voters is likely to be either higher or lower, and population shifts among different groups are inevitable. This is especially true here because California's population had to be allocated to fifty-three districts in 2001, rather than the fifty-two districts of the previous decade.

4. *Appellants' Reliance On Constitutional Cases Outside The Realm Of Redistricting Cannot Be Used To Create A Claim Here*

In sections II.C and II.D of their Jurisdictional Statement, Appellants discuss Equal Protection Clause cases outside the redistricting context, ranging from *Korematsu v. United States*, 323 U.S. 214 (1944), to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Adarand Construction Inc. v. Pena*, 515 U.S. 200 (1995). J.S. 17-20. These sections of the Jurisdictional Statement do not appear to advance a recognizable constitutional theory that Appellants contend should be applied in the context of redistricting.

There is no shortage of Supreme Court cases applying the Equal Protection Clause to the redistricting context, although Appellants consistently avoid them. Those cases, as Appellants point out, recognize that redistricting is different from other governmental decisions because "map-drawers may be aware of race." *Id.* at 18. As *Shaw I* explained: "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646 (emphasis in original); *see also* Pamela S. Karlan & Daryl J. Levinson, "Why Voting Is Different," 84 Cal. L. Rev. 1201, 1203 (1996).

5. *Appellants' Reliance On* De Grandy *And* Bossier Parish *Is Misplaced*

Appellants argue that the District Court decision is "hopelessly in tension" with *De Grandy* and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). J.S. 20. This argument is without merit.

The District Court did not reach the proportionality question addressed in *De Grandy* because, unlike in *De Grandy*, here the threshold *Gingles* pre-conditions were not satisfied. Had the District Court reached the proportionality question, it could well have concluded, as this Court concluded in *De Grandy*, that the challenged plan was in compliance with Section 2 under the totality of the circumstances. As a result of the November 2002 election, of the fifteen congressional districts in Los Angeles County, five members of Congress are Latino. J.S. App. 72. That proportion exceeds the Latino proportion of registration and citizen voting-age population in the County. *Id.*

Appellants contend that *Bossier Parish II* "seems, by fair implication, to establish" that the District Court's interpretation of Section 2 "is incorrect as a matter of statutory construction." J.S. 21. *Bossier Parish II* is a Section 5 case, and Appellants' reliance on Section 5 law is misplaced. Appellants concede that, "[u]nlike section 5 of the Voting Rights Act, section 2 does not refer expressly to 'purpose' and 'effect' . . ." *Id.* at 22. But according to Appellants, the failure to mention "purpose" and "effect" in Section 2 requires the Court to determine "whether section 2 implicitly incorporates these two analytically distinct notions of abridgement conjunctively or disjunctively." *Id.* No such determination is required. Section 2 does not "implicitly incorporate" any of the text of Section 5. Sections 2 and 5 "combat different evils and, accordingly, . . . impose very different duties upon the States." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

B. The District Court Correctly Held That Defendants Were Entitled To Summary Judgment On Appellants' Claims Under *Shaw v. Reno*.

Shaw I recognized a cause of action to challenge districts that are "unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 242 (quoting *Shaw I*, 509 U.S. at 644); *Miller*, 515 U.S. at 905 (same); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (*"Cromartie I"*) (same). "[T]he party attacking the legislature's decision bears the burden of proving that racial considerations are 'dominant and controlling.'" *Cromartie II*, 532 U.S. at 257 (citing *Miller*, 515 U.S. at 913). "That party must also show that its proposed alternative "would have brought about significantly greater racial balance." *Id.* at 258; *see infra* note 23. Mere "consciousness of race does not give rise to a claim of racial gerrymandering where race is considered along with traditional redistricting principles such as compactness, contiguity, and political boundaries." *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

The burden of proof on plaintiffs seeking to demonstrate a *Shaw* violation is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)). It is "presumed" that States have acted in good faith and drawn district boundaries in accordance with their customary districting principles. *Miller*, 515 U.S. at 915; *see also id.* at 928 (O'Connor, J., concurring). To overcome this presumption, a claimant must make "a showing sufficient to support" its *Shaw* allegations. *Id.* at 915. "Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 252 (1977). The *Shaw* doctrine "does not throw into doubt the vast majority of the Nation's 435 congressional districts." *Miller*, 515 U.S. at

928 (O'Connor, J., concurring). "That is so even though race may well have been considered in the redistricting process." *Id.* at 928-29 (citing *Shaw I*, 509 U.S. at 646).

Unlike a vote dilution claim, which is concerned with whether district lines prevent minority voters from participating equally in the political process, *Shaw I* is intended to remedy so-called "representational" or "expressive" harms. As this Court has explained, "[w]hen a district obviously is created solely to effectuate the perceived common interests of *one racial group*, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I*, 509 U.S. at 648 (emphasis added); *see also* Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election District Appearances After *Shaw v. Reno*," 92 Mich. L. Rev. 483, 527-29 (1993).

It is appropriate to grant summary judgment on claims arising under *Shaw*. *See Miller*, 515 U.S. at 916-17; *cf. Cromartie II*, 532 U.S. at 257 (reversing trial court's grant of judgment for *Shaw* plaintiffs after trial where only a "modicum of evidence" supported their claims). Indeed, California's redistricting plan following the 1990 census was also challenged under *Shaw*, summary judgment was granted, and this Court summarily affirmed. *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

The facts of this case are far removed from those that give rise to liability under *Shaw*. The districts at issue here are multi-ethnic in character; they are not race-based districts. J.S. App. 13-14.[22] "Their demographic make-up . . . conveys

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[22] The raw population data are provided above at page 7. Voting-age population is similarly diverse; CD 51 has a voting-age population that is 49% Latino, 25.1% white, 13.8% Asian, and 9.7% African-American; CD

no message that constitutional principles have been disregarded, or that the legislature sanctions racial classifications." *Id.* at 16. Moreover, as the District Court found, no bizarrely shaped districts are at issue here, and the State adhered to traditional districting criteria. *Id.* at 18, 20-38. Appellants admit that the districts they challenge are not "segregated districts," but nonetheless insist that they are entitled to a trial on their *Shaw* claims. J.S. 25.

No decision of this Court, or of any other court, holds that the *Shaw* doctrine may be used to require a state to dismantle ethnically diverse districts that adhere to traditional districting principles and to substitute districts in which a single ethnic group will reliably dominate—the remedy Appellants seek here. *See, e.g., id.* at 20, 24 n.16, 37, 59 (explaining Dr. Kousser's theory and the remedy Appellants' seek); *see supra* note 8.

Contrary to Appellants' assertion, the District Court did not hold that the *Shaw* doctrine can never apply to multi-ethnic districts. Rather, on the particular facts of this case, the District Court found that the districts in question cannot be understood as belonging to one ethnic or racial group, J.S. App. 13, and that "[t]here is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district," *id.* at 14. Moreover, neither district sends a message to elected representatives to ignore members of any particular racial or ethnic group, *id.* at 15, and the districts as a whole do not "send a message that the legislature sanctions racial classifications," *id.* at 16.

Even if, contrary to the record, the District Court had held that multi-ethnic districts can never violate *Shaw*, such a holding would be fully in keeping with this Court's precedents. As Appellants' own expert observed in the report their

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28 has a voting-age population that is 49.2% Latino, 37.2% white; 6.9% Asian, and 4.3% African-American. J.S. App. 14.

counsel relied upon in lobbying the Legislature, the "concerns that the Supreme Court mentioned in *Shaw v. Reno* and subsequent related opinions cannot apply to districts in which there is no ethnic majority of voters." *Id.* at 15 n.11. This Court's *Shaw* cases are overwhelmingly concerned with the harms caused when redistricting is accomplished for the sole purpose of ensuring the political domination of a single ethnic group. *See, e.g., Shaw I*, 509 U.S. at 648; *Miller*, 515 U.S. at 911-12. Furthermore, this Court has encouraged the creation of districts that contain "greater racial balance." *Cromartie II*, 532 U.S. at 258; *De Grandy*, 512 U.S. at 1020 (stating that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground"). This case does not call for reconsideration of these principles.[23]

Finally, Appellants argue that the District Court erred in holding that *Shaw* plaintiffs are required to show the subordination of traditional redistricting principles to racial concerns. J.S. 25-27. But the sole case they cite for this proposition, *Cromartie I*, expressly states that "[t]o carry their burden, [*Shaw* plaintiffs] were obliged to show—using direct or circumstantial evidence, or a combination of both—that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Cromartie I*, 526 U.S. at 547 (citations and internal quotation omitted); *see also Cromartie II*, 532 U.S. at 241 (stating that *Shaw* plaintiffs "must show at a minimum that the 'legislature subordinated

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[23] Having ruled that Defendants were entitled to summary judgment, the District Court had no occasion to consider the Senate's argument that Appellants' *Shaw* claim is also barred because Appellants failed to show the possibility of creating a district with "significantly greater racial balance." *Cromartie II*, 532 U.S. at 258; *see also generally* D. Ct. Docket No. 176 (Senate Defendants' Motion For Partial Summary Judgment Re: San Diego Congressional Districts). This argument provides an alternative basis for affirming the District Court's decision rejecting Appellants' *Shaw* claims.

traditional race-neutral districting principles . . . to racial considerations'") (quoting *Miller*, 515 U.S. at 916). Accordingly, the District Court committed no error in holding that the lack of *any evidence* that the Legislature subordinated traditional redistricting principles to race justified the granting of the Senate's summary judgment motions in this case. J.S. App. 20-38.

CONCLUSION

Appellants' counsel persistently warned the California Legislature that litigation would be the price of any legislative failure to accede to the unusual racial standards they advocated. And so it was. But the District Court unanimously responded by applying settled legal principles to the undisputed facts and summarily disposed of Appellants' claims, as should this Court on appeal. For the foregoing reasons, the judgment below should be summarily affirmed or this appeal dismissed for want of any substantial federal question.

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